No. 57122-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ROGER LEISHMAN,

Appellant,

v.

KATHRYN NADINE REYNOLDS, Executive Director of the Washington State Executive Ethics Board,

Respondent.

REPLY BRIEF OF APPELLANT ROGER LEISHMAN

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I. INTRODUCTION

Established Washington legal authorities govern this public corruption case. ***First***, like judges and every other State employee, lawyers employed by the Attorney General's Office must obtain private counsel to represent them in their individual ethics proceedings, even when the allegations involve unethical conduct occurring during the performance of their official duties. Assistant Attorney General Suzanne LiaBraaten's expenditure of public resources for the private benefit of her co-workers in their lawyer disciplinary matters was not authorized by RCW 43.10.040, and therefore violated the Ethics in Public Service Act. *Sanders v. State,* 166 Wn.2d 164, ¶ 18, 207 P.3d 1245 (2009) ("*Sanders II*").

Second, in her role as Executive Director of the Executive Ethics Board, Respondent Kathryn Reynolds has a nondiscretionary, ministerial duty to accept for filing ***every*** ethics complaint that complies with the procedural requirements set forth in RCW 42.52.410(1) and WAC 292-100-030. The Ethics in Public Service Act and its implementing regulations "define the duty with such particularity as to leave nothing to the exercise of discretion or judgment." *Freeman v.*

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Gregoire, 171 Wn.2d 316, ¶ 10, 256 P.3d 264 (2011) (citations omitted). Executive Director Reynolds cannot ignore ethics complaints alleging unethical conduct by her co-workers at the Attorney General's Office any more than she could disregard complaints alleging violations of the Ethics in Public Service Act by female state employees. This Court should reverse and remand the case for issuance of a writ of mandamus.

Third, Executive Director Reynolds contends her refusal to accept these Ethics Complaints for filing under WAC 292-100-030 is the equivalent of the Executive Ethics Board's discretionary decision not to enforce the Ethics in Public Service Act in a particular case. Resp.Br. at 14. However, Leishman's Petition alleges Executive Director Reynolds "colluded" with her "co-workers in covering up official wrongdoing." CP 244 ¶ 5. Even if the Court disregards controlling Washington authorities and adopts Executive Director Reynolds' radical position regarding the scope of her discretion at the outset of ethics proceedings, the Court should nevertheless reverse the trial court's CR 12(b)(6) dismissal order and remand Leishman's mandamus claim for adjudication of the parties' factual disputes under the applicable legal standard: whether

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Executive Director Reynolds' actions were "prompted by wrong motives, such that there is not only an abuse of discretion, but, in contemplation of law, there has been no exercise of the discretionary power." *Brown v. Owen*, 165 Wn.2d 706, ¶ 36, 206 P.3d 310 (2009) (quoting *State ex rel. Yeargin v. Maschke,* 90 Wash. 249, 253, 155 P. 1064 (1916)).

II. ARGUMENT

A. Because the trial court dismissed the mandamus petition under CR 12(b)(6), this Court must assume Leishman's allegations are true.

Executive Director Reynolds contends the bar grievances against her co-workers are "without merit." Resp. Br. at 13. However, courts resolving motions brought under CR 12(b)(6) must "presume the truth of the allegations" of the petition. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, ¶ 8, 331 P.3d 29 (2014). Therefore, "CR 12(b)(6) motions should be granted 'sparingly and with care.'" *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (citations omitted).

As alleged in the Amended Petition for Writ of Mandamus, Leishman has Post-Traumatic Stress Disorder. CP 245 ¶¶ 15-17. In March 2016, while employed by the Attorney

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General's Office as chief legal advisor to Western Washington University, Leishman hired an experienced disability lawyer for the specific purpose of engaging his employer in the interactive reasonable accommodation process mandated by the Washington Law Against Discrimination. CP 250 ¶¶ 48-53. While Leishman was represented by counsel, Chief Deputy Attorney General Shane Esquibel and former Senior Counsel Kari Hanson violated the prohibition on direct and indirect *ex parte* communications about the subject matter of the representation. CP 254 ¶¶ 79-85.

On December 19, 2018, Leishman filed bar grievances alleging violations of RPC 4.2, RPC 5.1, RPC 5.3, and RPC 8.4. CP 258 ¶ 113; *see also* CP 395 (bar grievance). At taxpayer expense, Assistant Attorney General LiaBraaten appeared on behalf of her superior Mr. Esquibel and her co-worker Ms. Hanson in their lawyer disciplinary matters. CP 258 ¶ 115. In a "Preliminary Response" dated January 18, 2019, Ms. LiaBraaten falsely represented to the Office of Disciplinary Counsel that "the reasonable accommodation process was put on hold" from March 2016 to May 2016 – the same period when Leishman's attorney was attempting to discuss potential

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disability accommodations by his employer. *Id.* at ¶ 116; *see also* CP 651 n.3 (Preliminary Response). At their lawyer's request, the Office of Disciplinary Counsel deferred any investigation into the bar grievances against Mr. Esquibel and Ms. Hanson, as well as the subsequent bar grievance against Ms. LiaBraaten. CP 259 ¶ 117; *see also* CP 662, 665.[1] Executive Director Reynolds then prevented Leishman from bringing these violations of the Ethics in Public Service Act to the attention of the Executive Ethics Board, instead choosing to act for the improper purpose of "covering up official wrongdoing" by her supervisor and co-workers. CP 244 ¶ 5.

Each of Leishman's allegations is corroborated by undisputed contemporaneous public records. *See, e.g.,* CP 281, 388, 391, 395, 415, 433, 439, 446, 518, 521, 647, 649, 660, 674. In any event, for purposes of dismissal under CR 12(b)(6), the Court must assume the truthfulness of the petition's

[1] On December 16, 2022, at the request of Assistant Attorney General Jeffrey Grant, a Review Committee of the Disciplinary Board again deferred any investigation into amended bar grievances alleging violations of the Rules of Professional Conduct by Suzanne LiaBraaten, Shane Esquibel, and Kari Hanson. *See* Declaration of Roger Leishman Regarding Code of Judicial Conduct Canon 2, Rule 2.11 ("Leishman Dec."), filed herewith, at Exs. 2, 4.

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allegations regarding conduct by the State's lawyers.

FutureSelect Portfolio Mgmt., Inc, 180 Wn.2d at ¶ 8.

B. Washington law forbids the expenditure of public resources to represent government attorneys in their individual lawyer disciplinary matters.

The threshold legal question[2] before the Court is whether RCW 43.10.040 "authorizes lawyers from the Attorney General's Office to represent state employees and officials in their individual ethics proceedings." App.Br. 22. As with the judicial ethics complaint in *Sanders II,* Washington law prohibits the expenditure of public resources to defend bar grievances identifying improper *ex parte* contacts by Mr. Esquibel and Ms. Hanson.

Each of Executive Director Reynolds' attempts to distinguish the bar grievances against her co-workers from the judicial ethics complaint against Justice Sanders is unavailing.

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[2] If the Court determines Executive Director Reynolds is correct and Washington law treats government lawyers differently than judges and other State employees, then the trial court's dismissal order may be affirmed without reaching any of the other issues presented on appeal. Conversely, if RCW 43.10.040 did ***not*** authorize Assistant Attorney General LiaBraaten's expenditure of public resources in her co-workers' lawyer disciplinary matters, then each of the Ethics Complaints necessarily falls within the jurisdiction of the Ethics in Public Service Act as a matter of law.

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First, Executive Director Reynolds makes a timing argument, contending the Supreme Court based its holding that Justice Sanders was not entitled to representation at public expense under RCW 43.10.040 on the fact that he "filed a declaratory judgment action seeking State representation *after* the CJC determined that probable cause existed to believe he had violated Canons 1 and 2(A) of the Code of Judicial Conduct." Resp.Br. 12 (emphasis in original). Executive Director Reynolds misstates the plain language of the courts' decisions in *Sanders I* and *Sanders II*. *See* App.Br. at 22-26. In particular, the Supreme Court ***rejected*** Justice Sanders' argument that the State could or should provide a defense to potentially meritless ethics complaints involving workplace conduct by State officers and employees:

> Justice Sanders argues that denying representation could leave a judge vulnerable to improper or unfounded charges of ethics violations. If a judge is wrongly charged, however, there are adequate safeguards within the Commission's procedures. Before a case may proceed to hearing, there must be a screening, a preliminary investigation, and a finding of probable cause.

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Sanders II, 166 Wn.2d at ¶¶ 17-18. Washington's lawyer disciplinary process involves similar procedures and protections. *See, e.g.,* ELC 5.3, 5.7, 6.1, 10.3.

Government attorneys are part of a self-regulating profession. Like every other Washington lawyer, at some point in his or her career an Assistant Attorney General can expect to respond to a bar grievance, meritorious or otherwise. Lawyers can choose to represent themselves in their disciplinary matters *pro se*, hire professional responsibility counsel, or obtain insurance. They may do nothing and hope the Office of Disciplinary Counsel summarily dismisses the grievance without further investigation under ELC 5.7(a), as often occurs. Private attorneys can negotiate with their firm or employer to include the defense of any bar grievances as a benefit of employment – but the State's lawyers cannot demand such a perk, because neither RCW 43.10.040 nor any other statute "enacted by the legislature in accordance with article 3, section 21" of the Washington Constitution authorizes the expenditure of public resources for "representation in legal proceedings" under the Rules for Enforcement of Lawyer

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Conduct. *State v. Herrmann,* 89 Wn.2d 349, 354, 572 P.2d 713 (1977).

Second, Executive Director Reynolds contends the ethics complaints alleging improper *ex parte* communications by her co-workers should be distinguished from the ethics complaint against Justice Sanders because "Justice Sanders 'knew or should have known that his conduct was unethical; therefore, he is not entitled to representation.'" Resp.Br. 12 (citing *Sanders II*, 166 Wn.2d at 172). As the Supreme Court found in its opinion affirming the decision of the Commission on Judicial Conduct, "Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour [of the McNeil Island Special Commitment Center] and met with litigants who had pending cases before the court." *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, ¶ 7, 145 P.3d 1208 (2006) ("*Sanders I*").

According to Executive Director Reynolds, *Sanders II* may be distinguished because "there is no allegation" contending "Esquibel or Hanson had, or have, any such knowledge" of improper contacts. Resp.Br. 12. Executive Director Reynolds mischaracterizes the allegations of the Amended Petition for

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Writ of Mandamus. For example, the bar grievance against Ms. Hanson, Exhibit L to the Amended Petition, includes the following allegation by Leishman:

> When the AGO directed me to meet with the investigator on April 14, 2016, Ms. Hanson knew I was represented by counsel on all issues related to my employment other than my sexual orientation discrimination complaint, including [disability lawyer] Ms. Phelan's attempts to reinstate me in my position and to seek a reasonable accommodation of my disability. Mr. Esquibel had direct supervisory authority over Ms. Hanson. Mr. Esquibel knew of Ms. Hanson's and the investigator's conduct at a time when its consequences could have been avoided or mitigated, but failed to take reasonable remedial action.

CP 400-01.

Third, Executive Director Reynolds argues that "these attorneys of the Attorney General's Office" acted "within the scope of their official duties in responding to the grievances during the threshold stage of the WSBA grievance process." Resp.Br. 13-14. The Ethics in Public Service indeed authorizes "the use of public resources to benefit others as part of a state officer's or state employee's official duties." RCW 42.52.160(2). Legal representation is a valuable benefit, whether funded by public or private resources. For example,

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the Legislature has authorized public defenders to represent criminal defendants and to appear on behalf of parents in their individual termination and dependency proceedings. *See, e.g.,* RCW 2.70.005 (establishing Office of Public Defense). In contrast, RCW 43.10.040 – the statute relied upon by the Attorney General's Office and Executive Director Reynolds – does ***not*** authorize lawyers from the Attorney General's Office to represent state employees and officials "being disciplined for ethical violations." *Sanders II*, 166 Wn.2d at ¶ 18. It might have been appropriate for Assistant Attorney General LiaBraaten to send a letter to the Office of Disciplinary Counsel on behalf of the Attorney General's Office that merely provided relevant information about the bar grievances from the perspective of respondents' employer. But that it is not what occurred. Instead, under the Attorney General's official letterhead, Assistant Attorney General LiaBraaten opened her January 18, 2019 response to the Office of Disciplinary Counsel with the words "I represent Shane Esquibel and Kari Hanson in relation to grievances 18-02070 and 18-02071 filed by Roger Leishman." CP 649.

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State officers and employees can violate the Ethics in Public Act during the course of their official duties. *See* App.Br. at 27 (citing *Rahman v. State*, 170 Wash.2d 810, ¶ 24, 246 P.3d 182 (2011), *superseded on other grounds by statute*, S.H.B. 1719, 2011 Wash. Sess. Laws, ch. 82); *see also Ellis v. City of Seattle,* 142 Wn.2d 450, 13 P.3d 1065, 1068 n.2 (2000) ("the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior") (citation omitted). Even if Assistant Attorney General LiaBraaten and Assistant Attorney General Grant appeared in Mr. Esquibel's and Ms. Hanson's individual lawyer disciplinary matters under the direct orders of their superiors at the Attorney General's Office, these government employees lacked statutory authority to use public resources for the "private benefit" of their co-workers, and therefore violated the Ethics in Public Service Act. RCW 42.52.160(1).

C. Executive Director Reynolds has a nondiscretionary ministerial duty to file complaints that comply with the Ethics in Public Service Act.

As Executive Director Reynolds acknowledges, mandamus is appropriate when the law imposes a mandatory

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ministerial duty to perform an act that is defined "with such particularity as to leave nothing to the exercise of discretion or judgment." Resp.Br. 18 (citing *Freeman*, 171 Wn.2d at 323). Complaints submitted for filing under the Ethics in Public Service Act must "state the name of the person alleged to have violated this chapter or rules adopted under it and the particulars thereof, and contain such other information as may be required by the appropriate ethics board." RCW 42.52.410. The Executive Ethics Board has adopted WAC 292-100-030, "Complaint procedures."[3] The parties agree that under this regulation, Executive Director Reynolds was not required to accept for filing any ethics complaints "which were incomplete, did not contain enough information to allege a

[3] Executive Director Reynolds falsely asserts "the legal standard for determining whether an EEB complaint will be accepted for filing" is "[n]otably absent from Leishman's outline of the general procedures for the filing of complaints." Resp.Br. 4 (citing App.Br. 13). To the contrary, the Brief of Appellant cites WAC 292-100-030 on pages 3, 14, 28, 30-32, 37, and 40-41. Leishman also quoted this regulation in the Amended Petition for Writ of Mandamus, CP 279 ¶ 167, as well as attaching a copy of the Executive Ethics Board's instructions for filing ethics complaints as Exhibit A to the petition. CP 279; *see also* App.Br. 14 (citing CP 279).

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violation of RCW 42.52, or were not within the jurisdiction of the EEB." Resp.Br. at 18 (citing WAC 292-100-030(3)). Conversely, Executive Director Reynolds had a mandatory ministerial duty to file ***every*** ethics complaint "presented in the proper form" that falls with the Board's jurisdiction. *State v. Flaherty*, 177 Wn.2d 90, ¶ 7, 296 P.3d 904 (2013) (clerk's duty to file motion).

Leishman's opening brief cited multiple cases, including *Flaherty*, that specifically address a state official's nondiscretionary ministerial duty to file documents when they satisfy enumerated requirements. App.Br. 29 (collecting cases). Executive Director Reynolds ignores each of these controlling Washington authorities. Instead, the State relies on an obviously inapposite federal case to argue that Executive Director Reynolds has "absolute discretion" to throw away any ethics complaint filed with the Executive Ethics Board. Resp.Br. 14 (citing *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)). In *Heckler*, death row inmates sought an order under the Administrative Procedure Act compelling the Food and Drug Administration to take "enforcement actions" to prevent the use of controlled substances in their

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executions. 470 U.S. at 823. The United State Supreme Court concluded agency action is excluded from judicial review "where statutes are drawn in such broad terms that in a given case there is no law to apply" or where the statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Wash. Envtl. Council v. Sturdevant*, 834 F.Supp.2d 1209, 1214 (W.D. Wash. 2011) (citing *Heckler*, 470 U.S. at 830-32). *Heckler* is consistent with Washington law, which likewise recognizes "a presumption of unreviewability of decisions of agency not to undertake enforcement action." *Nat'l Elec Contr. Ass'n v. Riveland*, 138 Wn.2d 9, 978 P.2d 481, 492 (1999) (declining to order L&I to conduct particular enforcement actions at correctional facilities) (citing *Heckler*, 470 U.S. at 831).

As Executive Director Reynolds observes, mandamus would be inappropriate if Leishman sought "to compel action against [accused State employees] by virtue of having filed a complaint; the discretion to make that decision was vested with" the Executive Ethics Board. Resp.Br. 20 n.8 (citing *Newman v. Veterinarian Bd. of Governors,* 156 Wn.App. 132, 144, 231 P.3d 840 (2010)). *Newman* involved a petition for a

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constitutional writ of certiorari of the Veterinary Board's ***final decision on the merits*** after a "nine month review" where the complainants' allegations of professional misconduct were "fully investigated by the Board." 156 Wn.App. at ¶ 2. However, Leishman does not seek a particular result from the Executive Ethics Board. Like *Heckler*, *Newman* is simply irrelevant to Leishman's mandamus claim against Executive Director Reynolds, which involves the staff's ministerial role at the threshold of the Executive Ethics Board process. CP 266 ¶¶ 164-70. The trial court erred as a matter of law by holding Executive Director's administrative review of ethics complaints for compliance with WAC 292-100-030 should be treated as a discretionary "agency decision to enforce or nor enforce" the Ethics in Public Records Act, rather than as a mandatory ministerial act. Resp.Br. 15 (citing RP 24:8-12 (1/7/22)).

D. Because the Ethics Complaints comply with the Ethics in Public Service Act, the Court should reverse the trial court's mandamus ruling.

The parties agree on the standard for superior courts to issue a writ of mandamus: "the petitioner must demonstrate (1) the party subject to the writ has a clear duty to act, (2) the petitioner has no plain, speedy, and adequate remedy in the

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ordinary course of law, and (3) the petitioner is beneficially interested." Resp.Br. 16 (citing *Seattle Times v. Serko*, 170 Wash.2d 581, 588–89, 243 P.3d 919 (2010))[4]; *see also* RCW 7.16.160, .170. The Amended Petition for Writ of Mandamus satisfies each requirement.

First, Executive Director Reynolds had a "clear duty to act." *Seattle Times*, 170 Wn.2d at 588. As discussed above, because no statute authorizes lawyers from the Attorney General's Office to represent state employees and officials in their individual ethics proceedings, Assistant Attorney General LiaBraaten's expenditure of public resources for the private benefit of her co-workers violated RCW 42.52.160(1). *See supra* at pp. 6-12. The Ethics Complaints therefore fell "within the jurisdiction" of the Executive Ethics Board. Resp.Br. 18 (citing WAC 292-100-030(3)). Executive Director Reynolds' conclusory assertion that the complaints against her co-workers "were incomplete" and "did not contain enough information to allege a violation of RCW 42.52," Resp.Br. 18, is false. CP 281-314 (Ethics Complaints); *see also* CP 395-403 (bar

[4] Executive Director Reynolds' brief also erroneously cites to the separate legal standard for exercise of the Washington Supreme Court's original jurisdiction over state officers, which is "nonexclusive and discretionary." Resp.Br. 16 (citing *Walker*, 124 Wash.2d 402, 407, 879 P.2d 920 (1994)).

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grievance); CP 405-17, 421-25, 433-35, 439-50 (additional information Leishman provided to Executive Director Reynolds).

Second, Leishman had no adequate remedy at law. To the contrary, because Executive Director Reynolds unilaterally short-circuited the complaint intake process, Leishman was prevented from petitioning the Executive Ethics Board for redress, and was denied access to the procedural remedies set forth in the Ethics in Public Service Act and its implementing regulations. *See, e.g.,* RCW 42.52.425(3) (right to appeal dismissal of complaint by staff).

Third, Leishman is "beneficially interested" in whether Executive Director Reynolds accepts his complaints identifying violations of the Ethics in Public Service Act. *Seattle Times*, 170 Wn.2d at 589. "The requirement that a party seeking a writ of mandamus must be beneficially interested is a simple standard: 'all that must be shown is that the party has an interest in the matter beyond that of other citizens.'" *Butts v. Constantine*, 198 Wn.2d 27, ¶ 491 P.3d 132 (2021) (citing *Retired Pub. Emps. Council of Wash. v. Charles*, 148 Wn.2d 602, 620, 62 P.3d 470 (2003)). As the complainant whose ethics complaints were rejected, Leishman has standing to seek mandamus relief.

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Under the Ethics in Public Service Act, Executive Director Reynolds has a nondiscretionary ministerial duty to accept for filing each ethics complaint that satisfies the requirements set forth in WAC 292-100-030, including the Ethics Complaints identified in the Amended Petition for Writ of Mandamus. The Court should reverse the trial court's dismissal ruling, and direct the trial court on remand to issue a writ of mandamus ordering Executive Director Reynolds to accept the Ethics Complaints for filing pursuant to RCW 42.52.410(1) and WAC 292-100-030.

E. Regardless of whether Executive Director Reynolds had discretion to choose which ethics complaints to accept for filing, the trial court erred by dismissing the Petition for Writ of Mandamus under CR 12(b)(6).

Leishman's Petition for Writ of Mandamus "survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery*." FutureSelect Portfolio Mgmt., Inc.*, 180 Wash.2d at ¶ 8 (emphasis in original) (citations omitted). Even if this Court agrees with Executive Director Reynolds that her decision whether to accept a particular complaint for filing under the Ethics in Public Service Act is "discretionary," Resp.Br. at 15 (citing RP 24:8-12 (1/7/22)), the trial court still erred by dismissing the mandamus petition under CR 12(b)(6).

Executive Director Reynolds cites a single case, *Stewart v. Dep't of Soc. & Health Servs*., which did not involve

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mandamus and merely recites the general abuse of discretion standard. Resp.Br. 21 (citing 162 Wn. App. 266, 273, 252 P.3d 920 (2011)). However, Washington courts apply a specific legal standard for abuse of discretion "in the mandamus area": conduct by an official that is "prompted by wrong motives, such that there is not only an abuse of discretion, but in the contemplation of the law there has been no exercise of the discretionary power." *Brown*, 165 Wn.2d at ¶ 36 (quoting *State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 253, 155 P. 1064 (1916)); *see also* App.Br. at 32-40.[5]

Without identifying any supporting authority or evidence, Executive Director Reynolds asserts she had "a number of valid and proper reasons" to reject the Ethics Complaints. Resp.Br. 21. According to Executive Director Reynolds:

- The Ethics Complaints "involved allegations against officials when engaged in official acts." *Id.* at 21-22. However, the expenditure of public resources for the

[5] Executive Director Reynolds asks the Court to disregard these controlling legal authorities, contending Leishman challenges her conduct "[f]or the first time on appeal" under the specific abuse of discretion standard applicable to mandamus claims. Resp.Br. at 20 (citing App.Br. at 31-40). The State's representation to the Court is false. CP 792-93; *see also* CP 745, 874.

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private benefit of individuals violates the Ethics in Public Service Act. *See supra* at pp. 6-12.

- The Ethics Complaints "were incomplete, did not contain enough information to allege a violation of the Ethics Act, and were not within the jurisdiction of the EEB." Resp.Br. 22. Executive Director Reynolds' conclusory assertion is obviously false. *See* CP 281-314.
- Former Special Assistant Attorney General Mark Fucile "was a contracted attorney and not subject to the Ethics Act." Resp.Br. 22. To the contrary, the definition of "state officers" subject to the Ethics in Public Service Act includes "any person exercising or undertaking to exercise the powers or functions of a state officer," such as Special Assistant Attorneys General. RCW 42.52.010(20).

Like the flimsy pretexts offered by the county commissioners in the seminal *Maschke* case, Executive Director Reynolds' proffered excuses for refusing to accept the Ethics Complaints merely establish a "gross abuse of discretion." 90 Wash. at 255.

Finally, Executive Director Reynold asks this Court to disregard controlling Washington mandamus authorities and

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instead follow the United State Supreme Court's decision in *Heckler v. Chaney.* Resp.Br. 14. However, in *Heckler* the justices recognized that even in cases of "absolute prosecutorial discretion," 470 U.S. at 834, the presumption of unreviewability is rebutted in factual circumstances like those described in Leishman's petition. For example, in *Heckler* the justices distinguished cases involving "a refusal by the agency to institute proceedings based solely on the belief that it lack jurisdiction"; where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities"; "where an agency flatly claims that it has no statutory jurisdiction to reach certain conduct"; or when officials act "for entirely illegitimate reasons, for example, nonenforcement in return for a bribe." 470 U.S. at 833 n.4, 839.

Executive Director Reynolds acted for "entirely illegitimate reasons" when she rejected the Ethics Complaint. 470 U.S. at 839; *see, e.g.,* CP 243 ¶¶ 3-5. The Amended Petition for Writ of Mandamus therefore states a claim for mandamus relief for purposes of CR 12(b)(6). Even if the duty to accept ethics complaints that comply with WAC 292-100-

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030 were discretionary rather than ministerial, this Court should reverse the trial court's dismissal order and remand the case for adjudication of Leishman's claim that Executive Director Reynolds abused her discretion.

III. CONCLUSION

Quis custodiet ipsos custodes?[6]

This appeal – like the related tort claims against Executive Director Reynolds and her co-defendants in the Federal Lawsuit and the PRA claims against the Office of the Governor in Thurston County Superior Court – centers on the State's continuing refusal to pay attention to Leishman's whistleblowing allegations, regardless of whether he petitions for redress under the Ethics in Public Service Act, the Rules of Professional Responsibility, the Washington Law Against Discrimination, or the Public Records Act. Disabled individuals, particularly those living with mental illness, are used to be being ignored. *See, e.g., In re M.A.S.C.*, 197 Wash.2d 685, 705, 486 P.3d 886 (2021) ("the belief that only visible disabilities require accommodation persists as just one example of how

[6] Juvenal, *Satire VI*, ll. 347-48 (*c.* A.D. 115) ("Who will watch the watchers?").

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parents with disabilities and their children face significant discrimination based largely on ignorance, stereotypes, and misconceptions. We do not condone it").

In contrast with disabled *pro se* litigants, the State's lawyers are accustomed to privilege – including their claimed entitlement to a taxpayer-funded defense in their individual ethics proceedings; the State's relentless denial of even the most obvious misconduct by lawyers employed by the Attorney General's Office; their multi-year failure to identify any exculpatory evidence; and the State's refusal to conduct the reasonable oversight necessary to avoid obvious conflicts of interest. *See, e.g.,* Leishman Dec. Exs. 15, 17, 18. This appeal was originally set for consideration by a panel of the Court on February 2, 2023. However, on January 17, 2023, the Court struck the matter from the docket and informed the parties the case would be reset on a future Court docket in due course. Chief Judge Rebecca Glasgow subsequently disclosed that while the lawsuit was pending, the Attorney General's Office assigned Assistant Attorney General LiaBraaten to represent both the Court and individual judges. *Id.* at Ex. 15. Ms. LiaBraaten "will also be providing training in a group

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session at an appellate judges' conference at the end of March 2023." *Id.* Leishman has therefore filed the accompanying declaration and exhibits to assist the Court and the judicial officers who will ultimately resolve this appeal as they endeavor to apply CJC Canon 2, Rule 2.11 to these unusual circumstances.

Leishman respectfully requests that after examining the law and the evidence, the Court reverse the trial court's ruling that accepting ethics complaints that comply with the requirements of the Ethics in Public Service Act is a nonministerial discretionary act, and remand this case for issuance of a writ of mandamus directing Executive Director Reynolds to accept the Ethics Complaints for filing pursuant to RCW 42.52.410(1) and WAC 292-100-030.

DATED this 28th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to RAP 18.17(c), I certify this document contains 4,713 words, excluding the title sheet, the table of contents, the table of authorities, the certificate of compliance, and signature block.

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February 28, 2023 - 12:01 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57122-6
Appellate Court Case Title:	Roger Leishman v. Kathryn Nadine Reynolds et al.
Superior Court Case Number:	21-2-01712-0

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